SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 128

PEARL McADEN,

Petitioner,

versus

STATE OF FLORIDA

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The opinion of the Supreme Court of Florida in this cause is reported in the advance sheets of Southern Reporter, 21 Southern Reporter, 2nd Series, 33, under date of March 29, 1945.

Jurisdiction

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229; 43 Stat. 937; 28 U. S. C. A. 344. This case presents constitutional issues, to-wit, the denial of rights, privileges and immunities secured and guaranteed to the Petitioner by Sections 11 and 12 of the Declaration of Rights of the Constitution of Florida, as

well as secured to the Petitioner by Articles V, VI and XIV of the amendments to the Federal Constitution. The Petitioner was denied compulsory process by the Court and thereby denied the opportunity to protect and defend himself against the charge of murder and said order of said court arbitrarily denying Petitioner compulsory process was in direct violation of this Petitioner's constitutional rights secured to him under both the State and Federal Constitutions as well as constituted a total abandonment and disregard of long established procedural requirements, by reason of which this Petitioner was denied due process and a fair and impartial trial as secured to him by Section 12 of the Declaration of Rights of the Florida Constitution, and protected by Article XIV of the amendments to the Federal Constitution, and this denial of fundamental right and departure from long established procedural requirements divested the State Court of jurisdiction of said cause as well as of Petitioner, and the State Court was without jurisdiction to try Petitioner or to impose judgment and sentence upon him; therefore the sentence or judgment imposed by the State Court was illegal and if the same remains effective this Petitioner will be deprived of his liberty in violation of his constitutional right as secured by the State and Federal Constitutions.

Statement of the Case

Your Petitioner, Pearl McAden, respectfully represents unto the Court that on February 7, 1944, an indictment was returned by the Grand Jury of the Thirteenth Judicial Circuit of the State of Florida, in and for Hillsborough County, charging him in one count with first degree murder; that, thereafter, to-wit, on February 11, 1944, the Petitioner was arraigned and entered his plea of not guilty to

said charge, and the Judge of said Court at that time set said case for trial for April 5, 1944; on March 22, 1944, Petitioner filed motion to require the State Attorney to furnish to Defendant's Counsel a complete list of all witnesses intended to be used by the State at the trial of said cause, and on March 24, 1944, the Court entered an order requiring the State Attorney to furnish said list; on March 25, 1944, the State Attorney served Counsel for Petitioner with a list of State witnesses in obedience to said order and filed with the Clerk a praecipe for witness subpoenas to be issued for State witnesses; on April 3, 1944, Petitioner filed and presented to the trial Judge a motion for subpoena duces tecum and on the same dates the said Judge entered an order denying the said witness process to Petitioner.

Thereafter the case was called for trial on April 5, 1944, as previously set, and resulted in a verdict of guilty of murder in the second degree; and, thereafter, Petitioner filed a motion for new trial (R. 389-396), and included in said grounds was the following:

> "Defendant was denied a fair and impartial trial as guaranteed by the Bill of Rights of the State of Florida, for the reason that he was denied the right of compulsory process, and in fact was denied the process of the Court, which constituted a denial of the fundamental right guaranteed by the Declaration of Rights."

And also included the further ground:

> "This defendant was denied the right of compulsory process as guaranteed by Section 11 of the Bill of Rights of the Florida Constitution, as well as Amendment VI of the Federal Constitution, which guaranteed to him compulsory process for obtaining witnesses in his favor."

And, also, included the further ground:

> "This defendant was denied in the trial of this cause the equal protection of the law as guaranteed by Amendment XIV of the Federal Constitution, as well as denied due process of law as guaranteed by Amendments V and XIV of the Federal Constitution."

And the trial Court on April 22, 1944, entered an order denying said motion for a new trial and on said date adjudged the Petitioner to be guilty of murder in the second degree and imposed final judgment and sentence of the law upon Petitioner, by ordering that he be confined in the State Prison of the State of Florida for the remainder of Petitioner's natural life.

Thereafter, Petitioner appealed to the Supreme Court of Florida (R. 400), the highest appellate court in said State, to have reviewed said trial proceedings, and final judgment, and in his assignments of error or grounds of appeal (R. 402), specifically assigned as error, among other things, the order of the trial Judge in denying to him compulsory process, and also denying to him a fair and impartial trial and due process, and equal protection of the law as guaranted by Sections 11 and 12 of the Declaration of Rights of the Florida Constitution, and Articles V and VI of the Amendments to the Federal Constitution and Article XIV of the Amendments to the Federal Constitution.

Thereafter, on January 30, 1945, the Supreme Court of Florida rendered its decision and final judgment, affirming the judgment and sentence of the lower Court; thereafter, Petitioner duly filed petition for rehearing which said Supreme Court did, on March 14, 1945, enter its order denying; and your Petitioner has exhausted all remedies available to him under the laws of the State of Florida; and your Petitioner did, on the 14th day of March, 1945,

file in the Supreme Court of Florida his petition for an order staying execution and enforcement of said judgment so that he might make application for writ of certiorari to this Honorable Court, and the said Supreme Court granted Petitioner's application for said stay for a period of ninety days so that this application might be made.

As the record before this Court, as hereinabove recited, shows, this case was, on February 11, 1944, set for trial on April 5, 1944, and upon motion of Petitioner's Counsel the Court entered an order on March 24, 1944, requiring the State Attorney to furnish Petitioner's counsel with a complete list of all State witnesses intended to be used at the trial, and on the 25th day of March, 1944, the State Attorney furnished said list to Petitioner's Counsel, and filed with the Clerk a praecipe for all State's witnesses. Appearing upon the list furnished to Petitioner's Counsel, as well as in the Praecipe filed with the Clerk of said Court by the State Attorney, were, among others, the names of:

Major Stribling.
William Williams (also known as Willie Wilson, as shown by the Record, page 216. This parenthesis is ours).
Pearl Sanderson.
Mathew Isom.
Herman Williams (and the Record shows that he was also known as Chauffeur Williams. This parenthesis is ours).

Petitioner's counsel in their efforts preparatory to the trial of said case learned that the State Attorney and his Assistants had conducted an *Official* investigation within a few days after the alleged homicide and prior to indictment by the Grand Jury, at which *official* investigation the above named witnesses testified, and that, present at said *official* investigation, was the official Court Reporter of the Circuit Court of Hillsborough County, Florida, who took

down the testimony of said witnesses stenographically, and that each of said witnesses had testified that they were eye witnesses to the shooting by Defendant Pearl McAden, and they had already been summoned to testify at the trial; Petitioner's counsel further learned that at said *official* investigation conducted by the State Attorney each of said witnesses, in giving his testimony had changed their testimony in material respects, as to what he had seen or heard, and what occurred on the occasion of the shooting; that is to say, that each of said witnesses had testified to one state of facts and later in the same hearing had testified to an entirely different and inconsistent state of facts, in material conflict with what he had previously testified to; so that Counsel for Petitioner, in their efforts preparatory to the trial of said case, filed and presented to the trial Judge a sworn application, on the 3rd day of April, 1944, for a subpoena duces tecum (Record, Page 6), to require the production of the testimony given by the above named witnesses at said *official* investigation, which had been conducted by the State Attorney, which application was sworn to and showed that the production of the testimony given by the above named witnesses at said official hearing before the State Attorney was not only necessary but vital and indispensable to the proper defense of Petitioner; and said sworn application for said process contained, among other things, the following:

> "Comes now the defendant, Pearl McAden, by his undersigned attorneys, and respectfully moves the Court to issue subpoena duces tecum to J. G. Nesbit, the Official Court Reporter of this Court, and all of his deputies, as well as to J. Rex Farrior, State Attorney, and J. Frank Umstot, Assistant State Attorney, and William C. Pierce, employed as Special Assistant State Attorney, requiring them to appear and produce and file with the Clerk of this Court, so as to make available to the Defendant, the transcribed testimony, as well as

the stenographic notes thereof, to-wit: the statements and testimony given by the following named persons before either the said Farrior, as State Attorney, said Umstot, as Assistant State Attorney, and the said Pierce, as Special Assistant State Attorney, which were taken down by the Official Court Reporter, or some of his deputies, in the City Hall of the City of Tampa, Florida, and at the County Jail of Hillsborough County, Florida, during the official investigation, which was being conducted and carried on by the prosecuting attorneys into the subject matter involved in this case immediately after the alleged killing, to-wit:

Major Stribling.
William Williams (who the record also shows is known as Willie Wilson, Record Page 216, and who testified along with the others as an eye witness for the State at the trial) (The contents of these parentheses are not included in the application).

Pearl Sanderson,
Matthew Isom, and Herman Williams (This witness testified that, as the Record shows, he was also known as Chauffeur Williams). (The contents of these parentheses are not included in the application).

"Defendant respectfully shows to the Court that J. Rex Farrior, State's Attorney, in and for Hillsborough County, J. Frank Umstot, as Assistant State's Attorney for said County, and William C. Pierce, did between January 15th and the 1st of February, 1944, conduct an official investigation into the alleged killing of Charles William Vanderhorst, Jr., and that the Official Court Reporter, or some of his deputies, acting in their official capacity as such Court Reporters in taking down the statements and testimony of the witnesses hereinabove mentioned, were present at the time of said official investigation and took down the testimony and statements of said witnesses; and that among said

persons who were caused to appear and testify at this investigation were the persons hereinabove named, and that each of said persons did personally appear and testify with reference to the subject matter involved in this prosecution. Defendant further shows that the above cause is set for trial in the above Court to begin Wednesday, the 5th day of April, 1944, and it is of vital importance and highly material to the defense of the Defendant that this official testimony herein sought be made available to him at the beginning of said trial and unless it is brought in before the Court and made so available the Defendant will be place- at a great disadvantage at said trial.

"Defendant further shows unto the Court that he is informed and verily believes that the said witnesses, to-wit:

Major Stribling,
Willie Williams,
Pearl Sanderson,
Mathew Isom, and Herman Williams,

at the time of giving said testimony in said *official* investigation made different statements, that is to say, each of them made entirely different material statements of fact, one of which was contradictory of the other within itself, so that each witness gave contradictory statements as to what he saw and heard, and in relation to what he knew in connection with the subject matter here under prosecution; that it is highly material and of vital importance to the defendant that he have available this transcribed testimony and the stenographic notes thereof at the time of the trial of the above cause so that his Counsel may be able to properly cross examine each of said witnesses above named, as well as establish the contradictory statements made by said witnesses."

The application for said subpoena duces tecum, which contained, among other things, the matters hereinabove quoted, was duly sworn to and presented to the trial Judge;

that as the record in this cause shows, no denial of any kind was made of any of the allegations contained in said sworn application, nothing was filed showing why this process should be denied Petitioner, and in this condition, under the decisions of this Honorable Court, the allegations of said application stood admitted to be true and the Court had no discretion to deny such process. Notwithstanding, the allegations of said application stood before the Court, uncontradicted and undisputed, and therefore were admitted to be true, the trial Judge did, on the 3rd day of April, 1944, enter his order denying Petitioner the process (Record, Page 10), and the Court's order is as follows:

> "The above matter coming on this date for hearing before the Court, upon application of Defendant for subpoena duces tecum, there being present at said hearing Charles F. Blake and Pat Whitaker, Attorneys for Defendant, and J. Rex Farrior and W. C. Pierce, Special Assistant State Attorney, and the Defendant's Counsel having presented to the Court the motion for subpoena duces tecum, together with subpoena they requested the Court to issue, it is:
>
> "Thereupon considered, adjudged and ordered that the motion for subpoena duces tecum be and the same is hereby denied, and the Court does decline to issue said subpoena duces tecum in said cause.
>
> "Done and ordered at Chambers, at Tampa, Florida, this 3rd day of April, 1944.
>
> (signed) Harry N. Sandler, Judge."

At the trial of said cause each of the persons named in the said application for *subpoena duces tecum*, and who testified at said *official* investigation, before the State Attorney, and whose testimony was sought to be required to be produced by said *subpoena duces tecum*, was placed upon the stand by the State, and each testified as State's witnesses, that he was present at the time and place of the homicide and saw

what took place, and testified as to what transpired and took place at the time of said homicide.

The sole defense, as the Record before this Court in this cause shows, was self-defense, so that it is perfectly apparent how vital and material and indispensable it became for Petitioner to have available to him at the trial the testimony of each of these witnesses given at the *official* investigation conducted by the State Attorney and his Assistants, to the end that Petitioner's counsel could develop before the Court and Jury the facts showing that each of said witnesses at said *official* investigation conducted by the State's Attorney, had in fact testified to contradictory and inconsistent state of facts; that is to say, that each witness at first told one state of facts and then had changed his testimony and told an entirely different version. This was what was made to appear in our application for a *subpoena duces tecum,* and is what we would have been able to develop had Petitioner not been denied the process of the Court. The denial of this fundamental right of process constituted prejudicial injury in and of itself, and it is perfectly apparent under the facts recited in the sworn application of Petitioner, which stands undisputed and uncontradicted, that the petitioner was denied the right to defend and protect himself at the trial by being denied the opportunity and means of exposing the duplicity of these eye witnesses of the State. The effect of the Court's order was to suppress this official testimony, which Petitioner was seeking to be required to be produced, and protected these State witnesses in their duplicity. A defendant can never, at a trial, protect himself against false or perjured witnesses when the trial Court suppresses the only medium by which the exposure of false witnesses may be made, as was done in this case. A trial conducted under such circumstances, when a citizen, regardless of the fact that he is a negro, stands charged with serious crime, has denied to him the right to properly and effectively defend

himself at the trial, through the action of the Court, the effect of which is to suppress material and vital evidence, and prevent the exposure of duplicity or falseness of State witnesses, transforms the trial into a hollow mockery. Under such conditions, if the highest Courts of our land approve this procedure, then our much vaunted right to a fair and impartial trial, due process, equal protection of the law, and the right of compulsory process, become meaningless.

Section 11 of the Declaration of Rights of the Constitution of Florida provides:

> "In all criminal prosecutions the accused shall have the right to a speedy and public trial, by an impartial jury, in the county where the crime was committed, and shall be heard by himself, or counsel, or both, to demand the nature and cause of the accusations against him, to meet the witnesses against him face to face, and have compulsory process for the attendance of witnesses in his favor, and shall be furnished with a copy of the indictment against him."

Section 12 of the Declaration of Rights to said Constitution of Florida, provides:

> "No person shall be subject to be twice put in jeopardy for the same offense, nor compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken without just compensation."

Articles V and VI of the Amendments to the Federal Constitution provide in effect the same guarantees. Section XIV of the Federal Constitution protects the citizens of Florida in the enjoyment of the fundamental rights secured to them under Sections 11 and 12 of the Declaration of Rights of the State Constitution. It is superfluous for us to argue and cite cases to establish that the right herein insisted upon—that is the right of process—is a fundamental right.

It finds root in the law of human rights, and is imbedded in the Bill of Rights of the Federal Constitution, as well as the Bill of Rights of the State Constitution, and is recognized as being of the same sacredness, along with the right that no person shall be compelled to be a witness against himself, and that every person charged with crime shall have the benefit of Counsel, and that every person charged with crime shall be advised of the nature and cause of the accusation against him, and so forth. This Court, in a long line of decisions, has consistently held these rights, which are carried in the Bill of Rights, to be fundamental human rights, and that when a trial is had and it appears that a person has been deprived of such rights so secured, it nullifies the trial, and strips the Court of jurisdiction to impose any legal judgment or sentence.

Being deprived of the record of the testimony given by the State witnesses before the State Attorney, at said *official* investigation, the Petitioner's Counsel was helpless at the trial because they did not have the information with which they could propound impeaching questions, as required by the law of Florida. This is made apparent by the Record before this Court, which shows that while the witness, Herman (Chauffeur) Williams, was testifying at the trial, as a witness for the State (being one of the witnesses who testified before the State Attorney at said *official* investigation and whose testimony was sought by said subpoena applied for (R. 206), he was interrogated on cross-examination by Petitioner's counsel, concerning his having testified before Mr. Farrior at said *official* investigation, and was asked:

> "Q. How many different statements did you make to them down there?
>
> "Mr. Farrior: I ask that the question be more specific as to the time and place and his different statements."

We could not be more specific, as it was this testimony given before Mr. Farrior in his *official* investigation, that the

Court denied us by denying our application for subpoena duces tecum, and the State Attorney insisted, and the law required, that we state in our question the time, the place and the exact statements which the witness had made on the previous occasion in said *official* investigation conducted by State Attorney Farrior; notwithstanding this requirement of law and Mr. Farrior's objection, while being unable to show what the different statements consisted of, we did succeed in showing that he had made entirely different statements, although we were prevented, on account of being deprived of his testimony, from showing what the contradictions and inconsistencies consisted of R. 206):

> "Q. Did you make—I am talking about different statements—you made different statements to them down there, didn't you?
>
> "A. Yes sir.
>
> "Mr. Pierce: I object to that, if your Honor please, does he mean a different date, or a different kind of statement, different dates or different statements, or made under different circumstances? What statements? This is unfair to the witness."

We could not incorporate in our question what statements because we had been denied the testimony and the same had been suppressed by the order of the Court in denying compulsory process.

So it is demonstrated by cross-examination of this witness that he did make different statements, but in the face of the objections raised, we could not be specific and incorporate in our questions the contradictory statements which he had in fact made at said *official* investigation. It was impossible for us to develop what he had first testified to, and follow it up by showing that he had materially and vitally changed his testimony during the same investigation, by showing that he told two vitally and materially different stories. This Court can see how it was impossible,

in the absence of the Record of that testimony which was sought by said process for us to develop this, although the witness admitted at the trial that he had told different stories at the *official* investigation before Mr. Farrior, the State Attorney. To deny this Petitioner the right to have turned on the floodlight of truth at the trial so that the Court and jury could have exposed before them the changed stories of these State witnesses deprived this Petitioner of the essential elements making up a fair and impartial trial, and the denial to him of the process by which to do this, denied him a fundamental right.

See *Johnson* v. *Zerbst*, 304 U. S. 458, 58 S. Ct. 1019.

See, also, *Chambers* v. *State of Florida*, 309 U. S. 227, 60 S. Ct. 472:

> "Use by a State of an improperly obtained confession may constitute a denial of 'due process of law' as guaranteed by the Fourteenth Amendment."

> "The scope and operation of the Fourteenth Amendment have been fruitful sources of controversy in our constitutional history. However, in view of its historical setting and the wrongs which called it into being, *the due process provision of the Fourteenth Amendment—just as that in the Fifth—has led few to doubt that it was intended to guarantee procedural standards adequate and appropriate, then and thereafter, to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority.* Tyrannical governments had immemorially utilized dictatorial criminal *procedure* and punishment to make scape goats of the weak, or of helpless political, religious or racial minorities and those who differed, who would not conform and who resisted tyranny."

> *"This requirement—of conforming to fundamental standards of procedure in criminal trials—was made operative against the States by the Fourteenth Amendment."*

In the last case supra, this Court found that the Defendants had been compelled to be witnesses against themselves through the manner in which the officers had coerced the confessions and reversed the conviction and judgment of the Courts of the State of Florida. The right here insisted upon is of equal dignity with the right that this Court gave effect to in that case; the denial of fundamental right in this case is just as flagrant as in that case.

See, also *Powell et al.*, v. *State of Alabama*, 287 U. S. 45, 53 Sup. Ct. 55, where it is said:

> "Failure of trial court to make effective appointment of counsel constituted a denial of due process within the meaning of Const. Amend. 14, because in a capital case, where the defendant is unable to appoint counsel and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the trial court, whether requested or not, to appoint counsel for him as a necessary requisite of due process of law; *and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.*"

See, also, *Glasser* v. *United States*, 315 U. S. 60, 62 S. Ct. 457, text 464, where this Court said:

> "(8, 9) The guarantees of the Bill of Rights are the protecting bulwarks against the reach of arbitrary power. Among those guarantees is the right granted by the Sixth Amendment to an accused in a criminal proceeding in a federal court 'to have the Assistance of Counsel for his defence'. 'This is one of the safeguards • • • deemed necessary to insure fundamental human rights of life and liberty' and a federal court cannot constitutionally deprive an accused whose life or liberty is at stake of the assistance of counsel. Johnson vs. Zerbst, 304 U. S. 458, 462, 463, 58 S. Ct. 1019, 1022, 82 L. Ed. 1461. Even as we have held that the right to the assistance of counsel is so fundamental

> that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment, Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527, so are we clear that the 'Assistance of Counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired."

The question involved in the last case supra was whether or not the defendant had been accorded his constitutional right of benefit of counsel, and while the defendant had an attorney representing him this Honorable Court found that under the circumstances it did not constitute effective representation and not a compliance with the constitutional safeguard securing the benefit of counsel to defendant. The right of the benefit of counsel is no more sacred than the right here insisted upon. They are of equal dignity.

See also *Ward* v. *State of Texas*, 316 U. S. 547, 62 S. Ct. 1139.

See also *Brown* v. *State of Mississippi*, 297 U. S. 278, 56 S. Ct. 461, text 464:

> *"The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."*

The right here insisted upon is rooted in the rights of mankind and preserved and carried in both the State and Federal Constitutions, and constitutes a fundamental right,

and a denial of such right constitutes such an abandonment and disregard of established procedure as to require a reversal.

This brings us to a consideration of whether or not the record of the testimony sought was subject to such process. We, again, direct the Court's attention to the allegations hereinabove quoted from the sworn application filed and presented to the Judge, which stands uncontradicted and undisputed and there admitted, that this was an *official* investigation. Under the law of Florida the State's Attorney is empowered to conduct such investigations. The State Attorney is a constitutional officer and he is clothed with the authority to issue witness subpoenas, to require the attendance of witnesses before him, and the refusal of a witness to testify subjects such witness to punishment for contempt. Section 27.04, Florida Statutes of 1941, provides, among other things, as follows:

> "• • • He is allowed the process of his court to summons witnesses to appear before him in or out of term time, at such convenient places in the county where such witnesses reside, and at such time as may be designated in the summons, to testify before him as to any violation of the criminal law upon which they may be interrogated, and he is empowered to administer oaths to all witnesses summoned to testify by the process of his court."

The State Attorney, as a matter of fact, in the exercise of the authority vested in him by the above statute, constitutes a one man grand jury, and certain it is that his investigations are official because they are specifically provided for by statute.

In the case of *Collier* v. *Baker*, Sheriff, reported in the Southern Reporter Advance sheets under date of March 1, 1945, 20 Southern Reporter, 2nd Series, 653, the Supreme Court of Florida had before it the question where a wit-

ness had refused to testify before the State Attorney at an investigation identical with the one alleged in the application for subpoena duces tecum, and the trial judge adjudged the witness in contempt for refusal to testify before the State's Attorney, and imposed sentence upon her, and she applied to the Supreme Court for habeas corpus. The Supreme Court in that case held that the investigation being conducted by the State's Attorney was authorized by statute, and constituted an official investigation, and that the witness was properly adjudged in contempt. As a matter of fact, the State's Attorney may hold and conduct such was done in the *Collier* case *supra*. In that case the grand jury or after the grand jury has investigated a capital case and returned an indictment charging a capital offense, as was done in the *Collier* case supra. In that case the grand jury had already returned the indictment charging a capital offense, and yet the Supreme Court held that the State's Attorney had a right under the law to conduct a further official investigation into the subject matter, and the Court in the *Collier* case, among other things, said:

> "The office of state attorney is created by the constitution. He is a semi-judicial officer retained by the public for the prosecution of persons accused of crime. His duties are prescribed by statute. Within the limits of the constitution and applicable statutes all steps in the prosecution of persons suspected of crime are under his supervision and control. By Section 27.04, Florida Statutes, 1941, F.S.A., the state attorney 'is allowed the process of his court to summon witnesses to appear before him in or out of term time, at such convenient places in the county where such witnesses reside, and at such time as may be designated in the summons, to testify before him as to any violation of the criminal law upon which they may be interrogated, and he is empowered to administer oaths to all witnesses summoned to testify by the process of his

court.' This statute is remedial in nature and should be liberally construed, for without it the powers and duties of the state attorney would be greatly circumscribed. State ex rel. Cooper vs. Coleman, 138 Fla. 520, 189 So. 691. We find nothing in the statute that attempts to limit the power of the state attorney to interrogate witnesses, except that the subject matter of the interrogation be confined to the question of the violation of any criminal law."

So that outside and beyond the allegations of petitioner's application that the investigation was an official investigation, the law made it such.

We direct the Court's attention to the fact that the sworn application alleged that the persons whose testimony was sought were *required* to appear before the State's Attorney, and that the official court reporter was present at said official hearing, and took down stenographically said proceedings; that the official court reporter of said court, J. G. Nesbit, was present and took down all of said official proceedings. Nesbit, the official court reporter, is not an employee of the State Attorney at all, but under the law occupies an official status as an officer of the court, separate and distinct from the State Attorney. He is appointed by the Governor of the State, upon the recommendation of the Circuit Judges, and he holds a commission from the Governor. Section 29.01 of the Florida Statutes of 1941, provides for this, and Section 29.02 of said statute prescribe the duties of said court reporter. Section 29.03 provides for the compensation of said official court reporter, and the same is paid out of public funds. He is as much a public officer as is the State Attorney. The Court will observe that said subpoena duces tecum was directed not only to the State Attorney and his assistants, but to this official court reporter, who, it was alleged, was present and took down stenographically all of said testimony; and it is fur-

ther alleged in said sworn application that said court reporter had transcribed said proceedings, and said application for subpoena duces tecum prayed that this official court reporter be required to personally appear and bring before the Court said transcribed testimony, as well as his notes of the testimony of said witnesses named in said application.

Section 11 of the Declaration of Rights of the Constitution of Florida secured to petitioner the right of compulsory process to have J. G. Nesbit, the official court reporter, as well as the State's Attorney and his Assistants, to appear and produce the record of the testimony given at that *official* investigation by the witnesses, under the showing made in the sworn application, and this was definitely decided and determined by the Supreme Court of Florida in the case of *State ex rel. Brown* v. *Dewell, Judge*, 123 Fla. 785; 167 So. 687. In that case defendants filed an application for subpoena duces tecum to require the production of testimony given by witnesses who testified before a grand jury, which witnesses had been placed upon the stand and testified at the trial, and it set forth that it was vital to their defense that the testimony given by said witnesses before the grand jury be made available to them to cross examine said witnesses; and in that case the writ issued and was served upon the official court reporter requiring him to produce the transcription of the notes of said testimoy of said witnesses who testified before said grand jury, as well as his notes, and file them with the clerk of said trial court, so that the same could be available for use by defense counsel in cross examining said witnesses. The subpoena was served upon the official court reporter and he appeared in court with his notes and transcription, but upon the advice of the State's Attorney refused to file the transcript with the clerk of the court, or to make the same available to the defendants or their counsel, upon the grounds, among others, that the defend-

ants were not entitled to the supbpoena duces tecum, because it would amount to a violation of the secrecy of grand jury proceedings. The trial court sustained the position of the State's Attorney and ordered that the court reporter could not be required to produce or turn over said testimony and notes. The only difference between that case and the instant case is that the testimony sought was given in an investigation conducted by the grand jury composed of eighteen persons, with the official court reporter present taking down stenographically the proceedings, while in the instant case, the investigation was being conducted by a one man grand jury, as authorized by law, with the official court reporter present taking down the proceedings. In that case the trial court condescended to issue the writ but refused to make it effective. In the case at bar the court arbitrarily and capriciously denied the petitioner process in the first instance. In that case the defendant applied to the Supreme Court of Florida for a mandamus during the course of the trial, to coerce the trial judge to make effective the subpoena duces tecum, by requiring the testimony to be turned over to the clerk, and made available to the defendants' counsel. The State Supreme Court granted temporary and peremptory writ, and required that said subpoena be made effective and that said testimony be made available to the defendants' counsel, and in passing upon the question, text page 690, among other things, said:

> "Where an information is based on an indictment returned by a grand jury, and the defendant is on trial before a criminal court of record after having been arraigned on such information, the defendant is entitled to compulsory process under Section 11 of the Bill of Rights of the Florida Constitution, to have brought into the trial court any material evidence shown to be available and capable of being used by

him in aid of his defense, including the beneficial enjoyment of the compulsory process of a subpoena duces tecum for that purpose. United States vs. Aaron Burr, 25 Fed. Cas. 30, No. 14,692d.

"A denial of the right to compulsory process guaranteed by the Declaration of Rights, whether accomplished in the form of a denial of the process itself, or in the form of a denial of the legal beneficial use of the fruits of such process after it is served, is procedure outside the limitations of the trial court's power in the trial of a criminal case. And no amount of judicial discretion, such as is ordinarily vested in the trial judge with reference to matters of evidence and procedure, can supply a defect or want of jurisdiction on the part of the court to proceed outside the limitations of the constitution with respect to a defendant's constitutional procedural rights under Section 11 of the Declaration of Rights to compulsory process and to the beneficial enjoyment of the fruits of that process after it has been issued and served. State ex rel. Dillman v. Tedder (Fla.) 166 So. 590.

"Where denial of the benefit of the constitutional Bill of Rights is clearly alleged and shown the remedy by writ of error may not be adequate to fully protect the rights of an accused to a speedy and fair trial according to essential requirements of law, and where the demonstrated exigencies of a particular situation shown to exist demand it, an appropriate original writ from the Supreme Court may be issued before, or during the progress of a criminal trial in order to secure to a defendant prior to conviction the protection of a fundamental right secured to him by the Constitution as a part of his trial. * * *

"Nor is Johnson's position before the Court any different than if he were a duly summoned defense witness of an ordinary kind and not a court reporter, such as a witness summoned into court to bring with him documentary evidence of value to the defense, for example, a record of fingerprints made by him that the defense deems material to its case, and thereupon

said witness had announced that because he had given his word to the state attorney not to reveal what he knew, or to let any one see the fingerprints without the prosecutor's consent, that he would refuse to confer with defense counsel about his knowledge as a witness, or let defense counsel examine the fingerprint record brought by him into court under subpoena duces tecum.

"The right of a defendant in a criminal case to compulsory process for witnesses in his behalf means something more than the barren and sterile issuance of a paper by which the witness is made to appear, but is permitted to suppress from defense counsel, pertinent evidence he possesses and for the purpose of examining into which, with a view of using it on the trial, he has been brought into court.

"The constitutional right to compulsory process as guaranteed by Section 11 of the Declaration of Rights means not only the issuance of service of a subpoena by which a defense witness is made to appear, but includes the judicial enforcement of that process and the essential benefits of it by the trial court. And with reference to the latter aspect of the subject, a trial court has no more authority to refuse to enforce for a defendant's benefit the production of the evidence available to be procured and for which compulsory process has been issued, than he has to deny the process itself in the first instance.

"It therefore follows that when the defendant in a criminal case claims his constitutional right to compulsory process for his witnesses, as guaranteed to him by Section 11 of the Declaration of Rights, the intent of the Constitution is that the trial court is under a bounden duty to enforce that right for defendant's benefit, as far as in law the same can be enforced. And if the defendant have a right to the enforcement of compulsory process for his witnesses, and to the beneficial enjoyment of that right in a practical way by being allowed to confer and consult with his witnesses after they are in court, with a view of

calling them to the stand for the purpose for which they have been summoned into court, it likewise follows that there is no discretion on the part of the trial court to refuse to enforce such a right as is founded on the Constitution itself, because discretion does not exist where there is no power except to act in one way. Jones v. Securities and Exchange Commission (decided April 6, 1936), 56 S. Ct. 654, 80 L. Ed. ——).

"Discretion does not exist where there is no power to act except in one way, so where a defendant on trial in a criminal court has demonstrated an organic right in the proper use of available and material evidence in his behalf, there is no judicial discretion on the part of the trial judge to deny to the defendant the appropriate and legal use of such evidence, by refusing to enforce its production or disclosure by a duly summoned defense witness, no rule of law or privilege of keeping the wanted evidence secret being made to appear sufficient to support the prosecuting officers' objection to the disclosure or production of the same for the information and guidance of defense counsel in the conduct of their defense for the defendant. The instant case comes squarely within the rule last stated, because all that is demanded in the present case is that the respondent trial judge be directed to order the duly summoned defense witness R. F. Johnson to do that which in law he is legally bound to do as a defense witness, namely, confer and advise with the defense counsel as to his capacity as a potential impeaching witness through the medium of notes and transcriptions that he has brought into court as such witness."

In the decision of the Supreme Court of Florida, quoted from above, which involved the identical question here involved, and in which they held that the court had no discretion in the matter of granting or denying such process to a defendant, and that it was a right secured to him by Section 11 of the Declaration of Rights of the Constitution, they

went further and bottomed their decision also upon the decision rendered by Chief Justice Marshall, in the case of *United States* v. *Aaron Burr,* 25 Fed. Cas. 30, No. 14,692-d This case is the outstanding case in this country on this question. Aaron Burr was charged with treason and it became material in his defense to have a letter produced which had been communicated by Thomas Jefferson, President of the United States, to Congress, and his counsel applied to Chief Justice Marshall for a subpoena duces tecum, addressed to the President of the United States, to require the production of the letter. The prosecuting counsel vigorously opposed the granting of the process upon the grounds that the files of the President were beyond the reach of the process of the court, and it was a personal matter sought by said process, and of such nature as was immune from the process of the court. The court handed down a very exhaustive opinion, and, among other things, stated:

> "The arguments turned more upon the propriety of granting the motion, than upon any strictly legal question; although the right of the accused to apply to the court for process to obtain any testimony whatever, at this stage of the case, was denied by counsel for the United States.
>
> "'On the part of the prosecution it was insisted that the subpoena was unnecessary, because certified copies of any documents in the executive departments could be obtained by a proper application. It was said to be improper to call upon the President to produce the letter of General Wilkinson, because it was a private letter, and probably contained confidential communications, which the President ought not and could not be compelled to disclose. It might contain state secrets, which could not be divulged without endangering the national safety. It was argued that the documents demanded could not be material to the defense, and objected that the affidavit did not even state, in positive terms, that they would be material.

"On the part of the defense it was denied that any affidavit whatever was necessary to support the motion. The proposition that the President could withhold a paper material to the defense, merely because it contained confidential communications, was denied, and pronounced wholly untenable in law.

"A copy of the letter, it was said, would not answer the purpose of the defense. General Wilkinson was admitted to be the witness upon whom the prosecution mainly depended. His relations to the prosecution was such, that he had the strongest possible motive for bolstering it up; and if he failed in it, he would himself sink into irreparable disgrace. *When he should come upon the stand to sustain a prosecution in which he had so much at stake, it might be of the utmost importance to confront him with his letter in his own handwriting.* A copy would not do, because he might deny it; *and no confidence was reposed by the defense in his integrity.*

"*As the legal mode of effecting this object, a motion is made for a subpoena duces tecum, to be directed to the President of the United States.* In opposition to this motion, a preliminary point has been made by the counsel for the prosecution. It has been insisted by them that, until the grand jury shall have found a true bill, the party accused is not entitled to subpoenas nor to the aid of the court to obtain his testimony.

"It will not be said that this opinion is now, for the first time, advanced in the United States; but certainly it is now, for the first time, advanced in Virginia. So far back as any knowledge of our jurisprudence is possessed, the uniform practices of this country has been, to permit any individual who was charged with any crime, to prepare for his defense, and to obtain the process of the court, for the purpose of enabling him to do so. This practice is as convenient and as consonant to justice as it is to humanity. It prevents, in a great measure, those delays which are never desirable, which frequently occasion the loss of testimony, and which are often oppressive.

"The genius and character of our laws and usages are friendly, not to condemnation at all events, but to a fair and impartial trial; and they consequently allow to the accused the right of preparing the means to secure such a trial.

"The constitution and laws of the United States will not be considered for the purpose of ascertaining how they bear upon the question. The eighth amendment to the constitution gives to the accused 'in all criminal prosecutions, a right to a speedy and public trial, and to compulsory process for obtaining witnesses in his favor'. The right given by this article must be deemed sacred by the courts, and the article should be so construed as to be something more than a dead letter.

"This point being disposed of, it remains to inquire whether a subpoena duces tecum can be directed to the President of the United States, and whether it ought to be directed in this case?

"If no inconvenience can be sustained by the opposite party, he can only oppose the motion in the character of an amicus curae, to prevent the court from making an improper order, or from burdening some officer by compelling an unnecessary attendance. This court would certainly be very unwilling to say that upon fair construction the constitutional and legal right to obtain its process, to compel the attendance of witnesses, does not extend to their bringing with them such papers as may be material in the defense.

"In contests of this description, the court takes no part. Every person may give in evidence, testimony such as is stated in this case. What would be the feelings of the prosecutor, if, in this case, the accused should produce a witness completely exculpating himself, and the attorney for the United States should be arrested in his attempt to prove what the same witness had said upon a former occasion, by a declaration from the bench that such an attempt could not be permitted, because it would imply a suspicion in the court that the witness had not spoken the truth?

Respecting so unjustifiable an interposition but one opinion would be formed.

"The affidavit on which the motion is grounded has not been noticed. It is believed that such a subpoena, as is asked, ought to issue; if there exist any reason for supposing that the testimony may be material and ought to be admitted."

See, also, *State ex rel. Everglades Cypress* vs. *Smith*, Circuit Judge, 104 Fla. 91; 139 So. 794.

We could cite innumerable cases sustaining this same proposition but it would only be repetition, and, as we feel, make this brief unnecessarily prolix.

Hard pressed, as the record shows this Petitioner to have been at the trial, it was the duty of the trial Judge to meticulously safeguard and protect to Petitioner every fundamental right insuring a fair and impartial trial.

We direct the Court's attention to the fact that in this case four of the Judges of the Supreme Court of Florida joined in the majority opinion, while three of the Judges dissented. The majority and dissenting opinions appear in the record before the Court, and we most respectfully and earnestly urge that the dissenting opinion, prepared by Justice Terrell, and concurred in by Justices Buford and Adams, states and applies the law correctly. The majority opinion is clearly unsound and deprives this Petitioner of his constitutional rights and renders nugatory the sacred guarantees of the Bill of Rights of the State Constitution, which are secured and protected by the XIV Amendment to the Federal Constitution, and if affirmed by this Honorable Court will be the means of innocent persons being convicted on false testimony. This, for the reason that, the process of the court can be denied to defendants, and the means of showing testimony to be false refused defendants, and false witnesses thereby protected. Can it be said that in the administration of criminal justice a fair trial is had, which comports with due process,

when, through the order of the trial Judge a defendant is denied compulsory process, to have brought in official records, which will prove the duplicity and falsity of State's witnesses?

We cannot conceive of a more abhorrent disregard and destruction of fundamental rights secured by the organic law than was perpetrated in this case through the order of the court in suppressing this official testimony, which was sought in the application of petitioner.

A casual reading of the majority opinion of the Supreme Court of Florida in this case will demonstrate that it rests upon flimsy and unsound bottom and is arbitrary and should not be allowed to form the basis and precedent for the destruction and denial of such a fundamental right here involved.

An analysis of the majority opinion of the State Supreme Court, as a basis for its affirmance of the denial of compulsory process to Petitioner, appears to rest upon the following basis, which are without merit:

(a) That said transcript of testimony was taken at an interview with the main witnesses by the staff of prosecuting attorneys preparatory for trial. This is an assumption by the Court in direct contradiction of the sworn application. The uncontradicted record being that it was an *official* investigation, conducted by the State Attorney, who was authorized to conduct such *official* investigations, and that the proceedings were taken down by an independent official, to-wit, the official court reporter.

(b) That said transcript of testimony was not a public document, but on the other hand was a transcript of a private interview by prosecuting counsel with the main State witnesses. The uncontradicted sworn application showed that it was an official investigation and not a private interview and the statutes stamped it as such. Standing undenied this was admitted in the record, and the Court

gainst said
had no authority to indulge such assumption aga
sworn application. testimony

(c) That the materiality and relevancy of the t re reading
sought was not shown in said application. A mere and con-
of the application will demonstrate how puerile ecord, this
trary to the actual facts, as disclosed by the re materiality
statement is. We can not conceive how the md be more
and necessity of documents of testimony could presented
clearly made to appear than in the application p record.
to the trial judge in this case, as shown by the cation that

(d) That it does not appear in said applica the State's
said witnesses were subpoened to appear before t
Attorney at the time they testified. how they

This is immaterial. It makes no difference but the ap-
got there since they were there and testified, b appear and
plication states that they were "required" to a
testify. application

(e) That it is not made to appear in said a
that said witnesses were sworn. d arbitrary

This further demonstrates how puerile and ecause it is
the decision of the State Supreme Court is, be veral times
recited and stated in the sworn application sev vestigation.
that the witnesses *testified* at said *official* inv ld that the
The lexicographers, as well as the courts, hol ation, under
word "testify" means, "make a solemn declarat the purpose
oath, or affirmation, in a judicial inquiry, for th's Law Dic-
of establishing or proving some fact"—Black's s. *State*, 90
tionary. And to the same effect see *Crosby* vs
Fla. 381; 106 So. 741. See, also, the following 43;

State vs. *Robertson*, 26 S. C. 117, 1 S. E. 44
Gannon vs. *Stevens*, 13 Kn. 459; 8;
Nash vs. *Hoxie*, 59 Wis. 384, 18 N. W. 408 .
O'Brien vs. *State*, 125 Ind. 38; 25 N. E. 137.

The sworn application of Petitioner for sai id subpoena
duces tecum not only states that the witnesses testified at

said *official* investigation but called for the production of the record of their "testimony." The word "testimony" is defined by Black's Law Dictionary as "evidence given by a competent witness under oath or affirmation," and holding to this effect is *Edelstein* vs. *United States,* 149 Fed. 636; *State* vs. *Berberick,* 38 Mont. 423; 100 Pac. 209; 1 Wigmore on Evidence, Section 479; *Sutton* vs. *Commonwealth,* 207 Ky. 597, 269 S. W. 754; *Meyers* vs. *State,* 112 Neb. 149, 198 N. W. 871.

So that the statement in said sworn application that the witnesses testified, and it was the record of testimony of such witnesses which was sought, the use of the words "testify" and "testimony" carried with them the legal signification that they had been sworn. However, even if they had not been sworn, their statements would have been subject to the subpoena duces tecum for impeachment purposes.

We feel, if the Court will carefully read the majority opinion it will find that the foregoing is a fair analysis of what appears to be the basis on which it rests, and this Court will be forced to the inevitable conclusion that it should not be permitted to stand as a basis to deprive Petitioner of his liberty for the balance of his natural life, and as a precedent to destroy and deny the fundamental right of compulsory process to defendants in future cases in the State courts of Florida.

It is, therefore, respectfully submitted that this case is one for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision of the Supreme Court of Florida.

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